IN THE

Supreme Court of the United States

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October Term, 1943

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No.————————

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J. L. BRANDEIS & SONS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

As supporting the foregoing Petition for Certiorari, and demonstrating that probable cause for a full consideration of the case, in ordinary course, obtains—considering the entire environment of the case—the following Brief is respectfully submitted:

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R2-6) is reported in 142 Fed. (2d) 972 (adv. sheets).

For ready reference, the opinion of the Board, in the Complaint case, from which the court action arose, appearing in the record as the Decision and Order of the Board (R1-67), will be found in 53 N. L. R. B. 352.

BASIS OF JURISDICTION

Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347(a); under Sec. 10(e) and (f) of the National Labor Relations Act, as amended (Act of July 5, 1935, Ch. 372, Sec. 10; 49 Stat. 453; 29 U. S. C. Sec. 160); and under General Rule 38, Sec. 5, Subd. (b) of this Court.

The opinion of the Circuit Court of Appeals was filed June 7, 1944 (R3-4) and the Decree of the Circuit Court of Appeals, entered pursuant thereto, was entered June 23, 1944 (R1-12). An Order, staying issuance of a Certified Copy of the Decree to the Board, was thereafter entered on July 18, 1944 (R3-16).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act (49 Stat. 449, Ch. 372, 29 U. S. C. Sec. 151, et seq). Certain sections of such Act, which are involved herein, are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

The Statement of the Case, pertinent to the Reasons relied upon for the granting of the Writ of Certiorari, as prayed herein, is contained in the foregoing Petition and will not here be enlarged.

It might supply clarity, however, if such Statement in the Petition were supplemented by a further thumb-nail sketch of how the supposed "interstate" aspects of the Store, as to its sales, were ascertained.

Manifestly, a retail department store—issuing no catalogues, soliciting no mail order business, selling no national concerns, employing no federal trade-marks, doing no national advertising, doing no wholesaling, and so forth—transacts all its business over its counters on the store's premises and, therefore, is engaged in a purely local activity. Its customers come to it at the Store, and are, in large part, unidentified because most of the sales are cash sales. For instance, because of Omaha being on a state border, the Store has many Council Bluffs, Iowa, customers, who migrate daily to Omaha and trade over the counters of the Store, but such sales are, like others, local sales.[12]

Consequently the only index of supposedly "interstate" sales were through (a) out-of-state credit accounts, (b) occasional mail orders, or, more properly, mail department transactions, where customers were elsewhere on vacation, sent gifts to friends or relatives in other states, or supplied their children away at school in other states, and (c) deliveries by other than store facilities—the store delivering merchandise to customers only within

[12] **United States v. Sutherland** (D. C., Mo.), 9 F. Supp. 904, stating "It is impossible to elaborate a truth so simple" of a like transaction with an out-of-state customer buying at the premises.

the state and maintaining no out-of-state delivery facilities whatsoever.

The significant thing about these three categories is that, in the first place, there were no solicitations of interstate sales; in the second place, such transactions were wholly casual, occasional and incidental; and, lastly, even in such cases, the sale transaction took place on the store premises, that is, over the counters (as in the case of other sales) in large part.

However, on an analysis of such very minor departures from the usual sales over the counters, with delivery on the premises or by store facilities within the state, the following developed:

a) The packages mailed out of the state (mail orders or delivery by mail facilities) were only .0024% of total sales (Co.'s Exh. 6C, R2 (a)-513, and see R2-46, 47, 65, and 253 to 255).

b) On sales to out-of-state credit customers, less than 1.1% of the total sales were not completed (including delivery) on the store premises,—this because only 2.2% of total sales were with out-of-state credit customers, and 66% of such custom, and, therefore, in this class, 1.45% of total sales, were, nevertheless, local sales, transacted and completed on the store premises (Co.'s Exh. 5C, R2 (a)-512, and see R2-44 to 47, 50 to 52, 74, 252, and 260 to 263).

c) From a delivery of packages (other than by mail) standpoint, 3.7% of total deliveries, but only 8/10 of 1% in total sales, were by independent out-of-state, express facilities (Co.'s Exh. 6½C, R2 (a)-513, and see R2-25, 40, 48-49, 102, and 256 to 260).

These three categories are not to be aggregated, as they represent different approaches and, consequently, overlap.

The net result is that the Board, in discharging the burden cast upon it of showing that the business of the Petitioner was other than a purely local and intrastate activity, was not able to demonstrate that more than 1% of the total sales of the Store were actually non-local or not transacted over the Store's counters and, therefore, as having to some extent an "interstate" character (but in the sense only that one or another phase of the completed sales transaction was not completed on the Store's premises).

The foregoing analysis is supplied, in order to demonstate the infinitesimal character of the alleged "interstate" business of the Store upon which (from the standpoint of sales) it was sought to attach Wagner Act coverage to the Petitioner.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that a local retail department store, conducting over-the-counter sales wholly within the confines of a state, is, nevertheless, subject to the provisions of the National Labor Relations Act, either as being in Interstate Commerce or as substantially affecting Interstate Commerce.

2. In holding that the wholly local character of such merchandising activity, comprising sales over-the-counter, is altered by the stocking of the shelves of the store, through purchases of stock or merchandise originating outside of the state.

3. In holding that casual, occasional or incidental sales, not aggregating over 1% of the Store's entire volume, completed in some phase of the sale outside of the

state (as by delivery by mail or other non-store transportation facilities), nevertheless, render such local retail department store subject to the Act.

4. In holding that a minimal quantity of sales to out-of-state customers (on credit, but made on the store premises); advertisements in newspapers with a minor circulation in other states (but soliciting only local sales over-the-counter on the store premises); delivery outside of the state by non-store facilities, completing sales made upon the premises—all in an amount not aggregating over 1% of the Store's entire sales volume—are valid considerations, altering the local or intrastate character of the Store.

5. In holding that the Record contains proof that a non-existent, but possible, Labor Dispute in the Petitioner's Store, particularly in two minor and non-essential alteration departments, involved in the case, would substantially burden or obstruct Interstate Commerce or the free flow of Interstate Commerce, if the operation of such Store or alteration departments were stopped or suspended and, therefore, that the interruption of the continuity of such Store or departments would have a direct, immediate and substantial effect on Interstate Commerce.

ARGUMENT IN SUPPORT OF ACCEPTANCE OF JURISDICTION BY THIS COURT BY GRANT OF CERTIORARI

We conceive it to be the function of this supporting Brief merely to demonstrate probable cause for the grant of Certiorari. We, therefore, abstain from an argument upon the merits, or from a citation of authorities of courts other than this Court, except insofar as is neces-

sary to demonstrate conflict of the decision under review with decisions or holdings of other Circuit Courts of Appeals.

I. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Matter.

To show the disparity between the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case—particularly in the main or principal test applied by the lower Court, to-wit, the influence of purchases of merchandise for local retail selling activities originating outside of the state—and the holdings on the same topic in other Circuits, we call attention to the following as demonstrating an irreconcilable conflict.

Thus, the Circuit Court of Appeals of the Second Circuit has stated of a local merchant in *Consolidated Edison Company v. National Labor Relations Board*:[13]

> "Consistently with these principles it can scarcely be doubted that *the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are engaged in interstate commerce.* In such a case the closing of the merchant's store by a strike of his employees would undoubtedly affect interstate commerce, but *the effects would be too remote and indirect to bring his activities within the range of federal regulation.* * * *" (Emphasis supplied.)

This is directly antipodal to the decision under scrutiny.

So in the Fourth Circuit, in the case of *National Labor Relations Board v. White Swan Company*,[14] the

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[13](C. C. A. 2) 95 Fed. (2d) 390, 393, aff'd 305 U. S. 197, 83 L. ed. 126.

White Swan Company operated a combined laundry and dry cleaning establishment in the City of Wheeling, West Virginia. In the opinion, that Court states:

> "While certain of its supplies are obtained from without the state, the volume of the interstate business thus involved is not sufficient, in our opinion, to bring the business within the jurisdiction of the Board. The record shows that these supplies consist of soap, bluing, bleach, solvent, coal, water, paper, tape and padding, and that respondent's purchases thereof during 1938 amounted to $38,333.15, of which $10,810.90 came from without the state. Respondent, however, operates delivery trucks in Ohio as well as in West Virginia, three of the delivery routes from its plants being in Ohio and eleven in West Virginia. The business involved is necessarily of a purely local character, as the record shows that a radius of fifteen miles is the practical limit for a laundry or dry cleaning business in this territory. The fact that business is done in Ohio, outside the state in which respondent's laundry is located, results from the fact that this purely local business is located in a city on a state line. Respondent transports garments in its trucks from those of its customers who reside in Ohio to its plant in West Virginia to be serviced, and then after servicing returns the garments in its trucks to the customers."

The Court was in doubt and therefore certified the questions of law to the Supreme Court of the United States.[15] The Supreme Court held that the questions were defective because they did not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based. That Circuit Court then further stated:

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[14](C. C. A. 4) 118 Fed. (2d) 1002.

[15]313 U. S. 23, 85, L. ed. 1164.

"A motion has been made by the Solicitor General that this Court amend the certificate heretofore made to the Supreme Court of the United States by certifying to that Court a question which would embody the purchase by respondent of a portion of its supplies in interstate commerce as well as the fact that it derives a substantial portion of its income from business which involves collections and deliveries in interstate commerce. *We are clearly of the opinion, however, as stated in our certificate, that the volume of interstate business involved in the purchase of supplies is not sufficient to bring the business of respondent within the jurisdiction of the Board.* And if it be held that the fact that respondent derives a substantial portion of its income from business which involves collections and deliveries in a state other than that in which the business is located does not confer jurisdiction on the Board under the Act, we are of opinion that the Board was without jurisdiction." (Emphasis supplied.)

The Court, in its certificate, further said:

"If the business of collecting and delivering articles in the manner stated in the questions brings the business of respondent within the Board's jurisdiction, the purchase of supplies does not increase jurisdiction; *if it does not, such purchase, in our opinion does not confer jurisdiction.*" (Emphasis supplied.)

That Court, therefore, categorically rejected out-of-state purchases as a jurisdictional base.

It is of interest, too, that the Circuit Court of Appeals for the Fourth Circuit made an observation at a more recent date, consistent with its foregoing decision, in *Schroepfer v. A. S. Abell*,[16] as follows:

"A sausage manufacturer who sells his product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate

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[16](C. C. A. 4) 138 Fed. (2d) 111.

sales *merely because he purchases the materials that go into the sausages in interstate commerce.*

"The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce." (Emphasis supplied.)

Conflict With Other Decisions on the Non-Influence of Out-of-State Stock Purchases

The conflict here indicated could be extended to other Circuits, as exemplified by final decisions therein, likewise refuting the influence of out-of-state purchases upon an otherwise local or intrastate business—particularly, one devoted to sales or distribution.

Thus in the Fifth Circuit, in *Jax Beer Co. v. Redfern*,[17] it was held that the local sale and distribution of beer is intrastate commerce, even though such beer was received from without the state and stored in a warehouse.

In *The Prescription House, Inc., v. Anderson*,[18] it was held that employees of a drug store were in intrastate commerce, notwithstanding the fact that the store purchased part of its stock of drugs and merchandise from outside of the State, and notwithstanding the further fact that such articles and drugs were shipped and transported to the Store in interstate commerce, as such transactions were merely incidental to the business of filling prescriptions and selling articles used in the sick room.

Numerous other cases support the same view.[19]

17(C. C. A. 5) 124 Fed. (2d) 172.

18(D. C., Tex.) 42 F. Supp. 874.

19**Kansas City Structural Steel Company v. Arkansas**, 269 U. S. 148, 152, 70 L. ed. 204, 206; **Duncan v. Montgomery Ward & Company, Inc.** (D. C., Tex.), 42 F. Supp. 879; **Winslow v. Federal Trade Commission** (C. C. A. 4), 277 Fed. 206; cert. den. 258 U. S. 618, 66 L. ed. 793; **U. S. v. Superior Products** (D. C., Idaho), 9 F. Supp. 943; **U. S. v. Sutherland** (D. C., Mo.), 9 F. Supp. 204; **Gerdert v. Certified Poultry**

Conflict With Other Decisions on Retail or Distribution Businesses as Not Being in, or Affecting, Interstate Commerce

A like conflict of the decision below with decisions in several other Circuits is demonstrated from the standpoint of characterization of a local sales or distribution business as being in, or affecting, Interstate Commerce.

Thus in the Sixth Circuit in *Allesandro v. C. F. Smith Company,*[20] the action involved a chain of grocery stores within the State of Michigan. It was held that such business was not engaged in interstate commerce, the Court saying in the opinion:

> "The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail.
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> "* * * The Smith business is a retail business, its goods are acquired by a local merchant for local disposition and differ not at all from those of the corner grocery except in volume and perhaps in selling price."

See, also, to like effect from the Ninth Circuit with respect to a chain retail shoe store operation, *Walling v. Block.*[21]

& Egg Company (D. C., Fla.), 38 F. Supp. 964; **Midland Oil Company v. Sinclair Refining Company** (D. C., Ill.), 41 F. Supp. 436; **Klotz v. Ippolito** (D. C., Tex.), 40 F. Supp. 422; **Moses v. McKesson & Robbins** (D. C., Tex.), 43 F. Supp. 528; **Walling v. Silver Bros. Company** (C. C. A. 1), 136 Fed. (2d) 168. Strangely, **Schwarz v. Witwer Grocery Co.** (C. C. A. 8), 141 Fed. (2d) 341, Syl. 5, and **Walling v. Mutual Wholesale Food & Supply Co.** (C. C. A. 8), 141 Fed. (2d) 331, Syl. 16, repel the principle that goods bought interstate for resale intrastate give an interstate commerce character.

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[20](C. C. A. 6) 136 Fed. (2d) 75.

[21](C. C. A. 9) 139 Fed. (2d) 269.

In *Pittsburgh Plate Glass Company v. Jarrett*[22] the action was under the Clayton Act, as amended by the Robinson-Patman Act, and it was there held that sales by a local branch store of a glass company to the general trade in the city, where the store was located, were not made in "interstate commerce." Also, under the Robinson-Patman Act, it was held in *Midland Oil Company v. Sinclair Refining Company*[23] that a distributor of gasoline within Chicago was not engaged in "interstate commerce," although purchasing gasoline from another corporation within the State, which, in turn, purchased from a refiner engaged in interstate commerce.

In *U. S. v. French*[24] the Court held interstate commerce was not affected under the National Industrial Recovery Act by a retail coal dealer's business, or to quote the second paragraph of the Syllabus:

> "Interstate commerce held not involved or affected, directly or indirectly, by village retail coal dealer's business of purchasing coal, shipped from mines in other states in carload lots, and selling it to consumers within radius of few miles from village for domestic purposes, without further transportation thereof, except by purchasers to places of final consumption, so that National Industrial Recovery Act is inapplicable to such business; shipments being subject to regulation only as intrastate commerce after coming to rest at such village (National Industrial Recovery Act, 48 Stat. 195)."

In the opinion the Court said:

> "The court can discover no causal connection, direct or indirect, between interstate commerce and hours of labor and wage scales in a retail business

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[22](D. C., Ga.) 42 F. Supp. 723.

[23](D. C., Ill.) 41 F. Supp. 436.

[24](D. C., Mich.) 10 F. Supp. 674.

> conducted in a rural community in which the annual sales of coal approximate 2,500 tons. *No proof appears here which will warrant the conclusion that interstate commerce is in any manner affected.* The relationship contended for is either infinitesimal or entirely illusory. Were such remote transactions as those in question to become subjects of federal regulation under the commerce clause of the Constitution, the reserved power of the states would become largely ineffectual." (Emphasis supplied.)

In *Collins v. Kidd*[25] the business was a retail ice plant located in a border town between Texas and Arkansas, but 75% to 90% of the sales were made in the place of location. It was sought to hold the business subject to the Fair Labor Standards Act as being in interstate commerce, because some of the products were sold in that part of the border town which was located in Arkansas. The Court held to the contrary, stating:

> "* * * It is clear, under the facts, that the defendants Kidd and others, living in a border line town between two states, were selling some of their products in that portion of the city across the state line. We do not think that this comes within the purview of interstate commerce contemplated by the Constitution of the United States. To do so would make every retail dealer in every border line town subject to the national rules governing interstate commerce, which was manifestly not the purpose of the Constitution or the intent of any statutory enactment upon such subject. * * *"

In *Boro Hall Corporation v. General Motors Corporation*,[26] the action was under the Sherman Anti-Trust Act, and the business involved was that of servicing and selling supplies for automobiles. The facts are more fully set

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[25](D. C., Tex.) 38 F. Supp. 634.

[26](C. C. A. 2) 124 Fed. (2d) 822.

out in the lower Court's decision.[27] As in the lower Court, the upper Court held that the business did not affect interstate commerce, the Circuit Court of Appeals saying:

> "* * * The second cause of action is based on an alleged restriction of the trade of 'the plaintiff and others in the business of servicing and selling supplies for automobiles.' *These acts were plainly intrastate and did not affect interstate commerce.* The second cause of action was therefore rightly dismissed. There is no allegation or proof that there was an interference or restriction of interstate commerce. * * *" (Emphasis supplied.)

In *Walling v. Goldblatt Bros., Inc.*,[28] in a case involving a chain of department stores and three warehouses, operating in two states, the following observations of the Court are of interest on the interstate commerce aspects of the business:

> "Here, once the goods reached the warehouses, they assumed a wholly local character. The function of the warehouses was to furnish activities and means for the conduct of a relatively local retail business conducted by one company. This function was that of an ordinary warehouse for a retail establishment and bears no resemblance to a 'throat' or a 'current of commerce.' Upon delivery to the warehouse, interstate commerce ceased. *Schechter Corp. v. United States,* 295 U. S. 495; *Gerdert v. Certified Poultry & Egg Co.,* 38 F. Supp. 964; *Winslow v. Federal Trade Commission,* 277 Fed. 206, 209 (C. C. A. 4), cert. denied 258 U. S. 618; *Atlantic C. L. R. R. v. Standard Oil Co.,* 275 U. S. 257, 267.
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> "Where orders are solicited within a state and the goods are shipped from without the state directly

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[27](D. C., N. Y.) 37 F. Supp. 999.

[28](C. C. A. 7) 128 Fed. (2d) 778, cert. den. 318 U. S. 757, 87 L. ed. 1130.

to the customer or to an agent for delivery to the customer the transactions are a part of interstate commerce until the goods reach the customer. *Jewel Tea Co. v. Williams*, 118 F. (2d) 202, 206 (C. C. A. 10), and cases there cited; *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291; *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52. But here there were no such prior orders. * * * The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce. *Jewel Tea Co. v. Williams*, 118 F. (2d) 202, 207 (C. C. A. 10), and cases there cited; *Lipson v. Socony Vacuum*, 87 F. (2d) 265, 267 (C. C. A. 5). Where goods are delivered to the buyer to be sold later and delivered to intrastate buyers subsequent acts are not commerce. *Jax Beer Co. v. Redfern*, 124 F. (2d) 172, 174 (C. C. A. 5); *Swift & Co. v. Wilkerson*, 124 F. (2d) 176 (C. C. A. 5); *Jewel Tea Co. v. Williams*, 118 F. (2d) 202 (C. C. A. 10); *Gerdert v. Certified Poultry & Egg Co.*, 38 F. Supp. 964; *Veazey Drug Co. v. Fleming*, 42 F. Supp. 689; *Klotz v. Ippolito*, 40 F. Supp. 422; *Foster v. National Biscuit Co.*, 31 F. Supp. 552; *Lipson v. Socony Vacuum*, 87 F. (2d) 265 (C. C. A. 3); *Atlantic Coastline R. R. v. Standard Oil*, 275 U. S. 257; *Winslow v. Federal Trade Commission*, 277 Fed. 206; *Fleming v. Arsenal Bldg. Co.*, 38 F. Supp. 207; *Rauhoff v. Gramling & Co.*, 42 F. Supp. 754."

In *Jewel Tea Co. v. Williams*,[29] several salesmen brought an action against the Jewel Tea Company for overtime compensation and liquidated damages under the Fair Labor Standards Act. The duties of plaintiffs consisted of selling and distributing the Company's product at retail to customers in their homes. All of the salesmen worked exclusively within the State of Oklahoma.

In the opinion the Court states:

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[29](C. C. A. 10) 118 Fed. (2d) 202.

"Where orders are solicited within a state and the goods are shipped from without the state directly to the customer or to the agent for delivery to the customers in fulfillment of specific orders, the transactions are held to be interstate commerce. But the facts in the instant case distinguish it from those cases. Here, the orders for merchandise forwarded by the branch manager to Barrington were not predicated on salesmen's orders on hand, but were based solely on the stock on hand and prior depletions thereof, and were made with a view to replacement of stock depletions and to fill anticipated demand or future orders. Sufficient stock was always on hand to fill the orders of salesmen at the time they were obtained and orders were always filled out of stock on hand and not from new stock received after the orders were obtained. The old stock moved out first and the new stock simply replaced it. Goods shipped from Barrington to the branch in Tulsa came to rest in Oklahoma and became commingled with the mass of goods already within the state, and they were there held solely for local distribution and use so far as the activities of the employees were concerned.

"Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers without a specific order from the customer, and the goods come to rest in a warehouse, the interstate commerce ceases when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce. (Citing Schechter Poultry Corporation v. United States, 295 U. S. 495, 543, 55 S. Ct. 837, 849, 97 L. Ed. 1570, 97 A. L. R. 947.)

In *Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, Inc.*,[30] the plaintiff brought an action under the provisions of the Federal Anti-Trust Law, charging monopolistic practices and price-fixing, detrimental to plaintiff. Many of the commodities sold by plaintiff were alleged to be national food brands, shipped in interstate commerce to the plaintiff. The defendants were a non-profit organization and trade association, and various wholesalers.

In the opinion the Court states:

"The Court is of the view that, leaving aside the question whether the practices of the defendants with regard to maintenance of prices, would be legal or illegal, reasonable or unreasonable, if interstate commerce were involved, the acts complained of *do not affect directly interstate commerce* and do not constitute a restraint of it.

"The plaintiff is a California corporation, engaged solely in the business of selling and distributing food, groceries and allied articles of merchandise at retail in various retail stores owned and maintained by it in the cities of Los Angeles, Long Beach, Lynwood and Compton, all in the County of Los Angeles, California.

"Assuming that some of the products on its shelves are imported from other states, the moment they reach its shelves, they come to rest and cease to be 'in the flow' of interstate commerce. Schechter Poultry Corp. v. United States, 1935, 295 U. S. 495, 55 S. Ct. 837, 97 L. Ed. 1570, 97 A. L. R. 947; Southern Pac. Co. v. Gallagher, 1938, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586.

"As they are not subject to regulation by the Congress in that condition, they are not within the contemplation of the Sherman Anti-Trust law, 15

[30](D. C., Cal.) 33 F. Supp. 539.

U. S. C. A. Secs. 107, 15 note, or any other anti-trust statute aiming to prohibit certain practices in interstate commerce.

> "The activities of the defendants, complained of by the plaintiff, are limited to merchandise of the plaintiff *after it comes to rest.* They are not even state-wide, but are limited to six northern counties of California." (Emphasis supplied.)

In *Lipson v. Socony Vacuum Corporation,*[31] the plaintiff brought an action at law to recover treble damages under the Clayton Act. Defendant company distributed gasoline from local storage tanks in Massachusetts to consumers, in tank trucks at tank car prices. Defendant company shipped gasoline into the state to supply long term contracts and authorized dealers, selling on a commission basis, and to supply exclusive retailers on a tank car market. The Court holds that distribution from the defendant's local storage tanks, direct to the consumer, in tank trucks, at tank car prices, is intrastate commerce.

If it be said that some of the foregoing characterizations of retail activities were influenced by the narrower jurisdiction obtaining under the Fair Labor Standards Act, the answer is that such narrower jurisdiction did not permeate the decisions rendered under the National Industrial Recovery Act, the Sherman Anti-Trust Act, the Clayton Act or The Robinson-Patman Act. Furthermore, as stated in an article on "Businesses Subject to the National Labor Relations Act:"[32]

> "The same reasons which militated against the regulation of wages and hours render unlikely the extension of the Act to companies which do a purely local business."

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[31] (C. C. A. 1) 87 Fed. (2d) 265.

[32] 35 Mich. L. Rev. 1286, 1297.

A definite conflict, then, is apparent—from both the standpoint of purchases, as well as from the standpoint of sales.

II. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Honorable Court.

We adopt here the allegations of the foregoing Petition, in support of this point, at page 11 thereof without further exposition.

III. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court.

That the decision below by the Circuit Court of Appeals for the Eighth Circuit runs counter to the philosophy and trend of many prior decisions of this Honorable Court is apparent from a rehearsal of some of this Court's major decisions, under the National Labor Relations Act; under similar or other Federal Acts with a like jurisdictional standard; and, generally, applying the Federal commerce power, as follows:

(a) Particular Vice of the Lower Court's Decision in Drawing on Purchases of Merchandise, Originating in Other States, for the Stocking of the Shelves of the Local Merchant; as Furnishing a Jurisdictional Base Under the Act

When the lower Court completely overlooked the significance of the single character of the Petitioner's store as being engaged in only one business, namely, local retail selling over-the-counter on the Store premises, it has, instead, considered the Petitioner's store as also being

engaged in another, or the, business of importing merchandise from other states. It thus violates the standard laid down in the first case decided by this Court under the Act, *National Labor Relations Board v. Jones & Laughlin Steel Corporation*[33] when that case limited its decision on the coverage of the Act, to enterprises "making their relation to interstate commerce the *dominant* factor in their activities." The dominant factor in the Petitioner's store activities is its relation only to local or intrastate commerce, which absorbs 99% of its activities.

Similarly, in *Hopkins v. United States*[34] the defendants were commission merchants on the Kansas City Livestock Market. The action was brought under the Federal Anti-Trust Act. The Court discussed and decided the character of such merchants in the following language:

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affects interstate commerce at all, does so only in an indirect and incidental manner?
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> "* * * *The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories.* * * *
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> "The character of the business of defendants must, in this case, be determined by the facts occurring at that city." (Emphasis supplied.)

33301 U. S. 1, 81 L. ed. 893.

34171 U. S. 578, 43 L. ed. 290.

Purchases of stock for the shelves of the Store from outside the state are definitely not a guide or index to the Store's character, as being either intrastate or interstate.

Many decisions from this Court are illustrative of the error into which the lower Court has fallen.

A large array of decisions completely discount or eliminate outstate purchases, for the stocking of local distribution facilities or activities, in the consideration of the question of whether or not the Federal Commerce power envelops the particular enterprise by reason thereof.

As well expressed in the recent case of *Walling v. Jacksonville Paper Company*:[35]

> "Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the act solely because it makes its purchases interstate."

This holding was made despite the fact that it was urged upon the Court that, because only retail establishments were specifically exempted from the Fair Labor Standards Act, wholesale establishments must be deemed included.

It will be noted that in *Consolidated Edison Company v. National Labor Relations Board*[36] the Circuit Court pronounced that:

> "It can scarcely be doubted that the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of

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[35]317 U. S. 564, 571, 87 L. ed. 460, 468.

[36](C. C. A. 2) 95 Fed. (2d) 390, 393; aff'd 305 U. S. 197, 83 L. ed. 126.

> his stock in trade originates outside of the State, or some of his local customers are engaged in interstate commerce."

The Supreme Court, in affirming the foregoing decision, likewise said:[37]

> "In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies, of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas. * * *"

In *A. L. A. Schechter Poultry Corporation v. United States*,[38] it will be recalled that the basis of the Act might be said to be as broad and sweeping as that of the National Labor Relations Act, in that it was predicated upon transactions "affecting interstate or foreign commerce." After holding that the hours and wages of those employed in poultry slaughter houses in Brooklyn, and the sales there made to retail dealers and butchers, were not interstate commerce, but were merely local matters, the Court added:

> "*The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use.* So far as the poultry here in questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. *It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States.* * * *" (Emphasis supplied.)

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[37] 305 U. S. 220, 83 L. ed. 126, 135.

[38] 295 U. S. 495, 79 L. ed. 1570.

It then turned to the question of whether or not the defendants' transactions affected interstate commerce, and the Court said in that respect:

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. * * *
>
> "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. * * *
>
> "But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * *"

In Mr. Justice Cardozo's concurring opinion, he said:

> "* * * There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. * * *
>
> "The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. * * *
>
> "To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose

and counteract them, there will be an end to our Federal system. * * * "

In *Rosenberg Bros. & Co. v. Curtis Brown Co.*[39] officers of a retail store purchasing merchandise in other state were held not subject to service there, the Court holding accordingly to the second headnote (the opinion being by Mr. Justice Brandeis):

> "A corporation doing a small retail business in one state is not doing business in another state, so as to be subject to suit there, *merely because it purchases in the latter state a large portion of the merchandise to be sold in its retail store.*" (Emphasis supplied.)

The case of *Rast v. Van Deman & Lewis Co.*[40] involved the delivery by a Florida merchant of coupons or profit-sharing certificates redeemable in premiums in connection with the sales of merchandise at retail. The question was whether a state license tax could be applied thereto on the ground that the coupons or certificates had been inserted in the retail packages by the manufacturer outside of the State, and, therefore, within the protection of the commerce clause, as well as that the coupons or certificates were redeemable outside of the state. The Court, however, held that the transactions were not in interstate commerce and said:

> "* * * In other words, they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the state, and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. * * *

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[39]260 U. S. 516, 67 L. ed. 372.

[40]240 U. S. 342, 60 L. ed. 679.

> "The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce; they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their disposition in the packages of importation. *Of course, there is shipment to Florida merchants, but for the disposition of the merchandise in retail trade.* The schemes contemplate such disposition and are executed by it. * * *." (Emphasis supplied.)

In *Wagner v. Covington*[41] the business involved was that of a manufacturer of soft drinks, who also sold to retailers on both sides of the Ohio River, that is, at Cincinnati, Ohio, where his establishment was located, and opposite thereto at Covington, Kentucky. In resisting a license requirement sought to be imposed by the City of Covington, Kentucky, he asserted that he was engaged in interstate commerce in bringing soft drinks across the state line. The Supreme Court observed that the transportation across the state line was in itself interstate commerce, but that the business of distributing soft drinks to retailers within Covington, Kentucky, was a purely local transaction, and in that connection said:

> "So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not."

Therefore, as will be observed, the Court completely divorced the origin of the goods from the local transaction

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[41] 251 U. S. 95, 64 L. ed. 157.

in order to ascertain its character. To like effect see *Blumenstock Bros. Advertising Agency v. Curtis Publishing Company,*[42] *Ficklen v. Taxing District,*[43] and *Askren v. Continental Oil Co.,*[44] in all of which cases the goods sold emanated from other states or the transaction was in relation to goods moving in interstate commerce, but the transaction was nevertheless considered local and as not affecting interstate commerce. Of like purport is *Moore v. New York Cotton Exchange,*[45] which held that a transaction between cotton exchange members for the purchase and sale of cotton on the spot was local and not interstate business, despite a possible interstate shipment which the transaction would, at least, influence.

So in *Southern Natural Gas Co. v. Alabama,*[46] it was held that service lines carrying gas to large industries within the state were local in character, notwithstanding the fact that the gas entered such local lines from the large interstate mains and as a result of interstate commerce. See also *Best & Company v. Maxwell.*[47]

(b) Failure of Lower Court to Recognize Department Stores as Belonging to "Host of Local Enterprises" Judicially Excluded From Operation of Act

This case is directed against an unfair labor practice "affecting commerce" proscribed by Section 8 of the Act. The lode star is, therefore, whether J. L. Brandeis & Sons either is in such interstate commerce or affects inter-

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42252 U. S. 436, 64 L. ed. 649.
43145 U. S. 1, 36 L. ed. 601.
44252 U. S. 444, 64 L. ed. 654.
45270 U. S. 604, 70 L. ed. 754.
46301 U. S. 148, 57 L. ed. 970.
47311 U. S. 454, 85 L. ed. 275.

state commerce, so that it may be said that a question "affecting commerce" has arisen.

It is only necessary to advert to the first pronouncement of this Supreme Court upon the validity of the National Labor Relations Act to perceive its limitations. This Court, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[48] made the oft-referred to observation that—

> "* * * there may be but indirect and remote effects upon interstate commerce in connection with a *host of local enterprises* throughout the Country * * *." (Emphasis supplied.)

What is the "host of local enterprises" which it has been authoritatively adjudicated do not come within the purview of the National Labor Relations Act?

Certainly there is a no more appropriate example than that of the local retail store, for how otherwise could the Supreme Court have contemplated a "host" of local establishments, not subject to the Act, if it left out the local retail stores which are characteristic of every Community in the Nation down to the smallest hamlet?

(c) Failure to Gauge Effect That Act Does Not Extend to All Employers and All Employees

Far from embracing all employees within the Nation, the National Labor Relations Act actually is circumscribed in its operation so as to apply to only certain employers and employees. This Court, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[49] laid

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[48] 301 U. S. 1, 30, 81 L. ed. 893, 914.

[49] 301 U. S. 1, 30, 81 L. ed. 893, 907, 908, 911.

down as the organic law concerning the sphere of action of the Board the following:

> "* * * The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of a State. That *distinction* beween *what is national* and *what is local* in the activities of commerce is vital to the maintenance of our Federal system. * * *
>
> "*The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers.* Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. * * *
>
> "Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. *The question is necessarily one of degree.* * * *

Similarly, in *Washington, Virginia and Maryland Coach Company v. National Labor Relations Board,*[50] this Court said:

> "The contention that the act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, is plainly untenable. As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power. * * *"

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[50] 301 U. S. 142, 146, 81 L. ed. 965, 969.

(d) Failure to Observe Maintenance of Distinction Between "National" and "Local" Matters

The line of demarcation between what is national and what is local was well expounded by this Supreme Court in *New York ex rel. Pennsylvania R. Co. v. Knight*,[51] where the question at issue was whether a local taxicab service shuttling between the railroad terminal and the hotels was an extension of the interstate commerce carried on by the railroad carriers entering and leaving such terminal. In holding that the taxicab service was an essentially local activity, although intimately related to the interstate activity, which it supplemented and served, the Court said:

> "* * * To hold the even balance between the nation and the states in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate, and assign the relation or transaction to the control of the nation or of the state, is often most perplexing. And this case fully illustrates the perplexities.
>
> "It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. * * * *On the other hand, the*

[51] 192 U. S. 21, 48 L. ed. 325.

cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. * *

"* * * As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? *And where will the limit be placed?*

"We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation." (Emphasis supplied.)

It is significant that in the recent decision of *Parker v. Brown*,[52] this Court adhered to—

"The distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for such commerce, and the regulation of those who engage in the commerce by selling the product interstate,"

the Court observing that such distinction served in general as "a ready means of distinguishing" activities, respectively subject to state and national regulation.

A like caution was expressed in *National Labor Relations v. Jones & Laughlin Steel Corporation*[53] and *Santa*

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[52]317 U. S. 341, 362, 87 L. ed. 315, 332.

[53]301 U. S. 1, 81 L. ed. 893.

Cruz Fruit Packing Company v. National Labor Relations Board.[54]

(e) Failure to Consider That Effect on Interstate Commerce of Local or Intrastate Commerce Must Be Direct, Immediate and Substantial as Prerequisite to Board's Jurisdiction

Another restraint laid down by this Court, upon exercise of jurisdiction by the Board, was in *Santa Cruz Fruit Packing Company v. National Labor Relations Board,*[55] which the Court expressed as follows:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' *and not all commerce* but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce, but the constitutional differentiation still obtains. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 546, 79 L. ed. 1570, 1588, 55 S. Ct. 837, 97 A. L. R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.'
>
> "To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is

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[54]303 U. S. 453, 460, 82 L. ed. 954, 957.

[55]303 U. S. 453, 466, 82 L. ed. 954, 960.

necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' * * *'" (Emphasis supplied.)

In *Anderson v. United States*,[56] the issue involved the buying and selling of cattle emanating from different States at the Kansas City Stock Yards. A Bill was brought under the Federal Anti-Trust Act against Yard traders on account of their association as the Traders Livestock Exchange. As stated, the cattle came from various States and were placed on sale at the Stock Yards, which formed the only available market for many miles around. Repelling the contention of Federal jurisdiction, the Court decided:

"* * * While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. *A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.* * * *

"They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress. * * *" (Emphasis supplied.)

To similar effect, and requiring that the labor dispute must directly burden or obstruct or affect interstate com-

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[56]171 U. S. 604, 43 L. ed. 300.

merce, see, also, *National Labor Relations Board v. Fainblatt*,[57] in which case the Court held that the unfair labor practices involved must have—

> "such a close and substantial relation to the freedom of interstate commerce from injurious restraint that those practices may constitutionally be made the subject of federal cognizance."

In the more recent case of *U. S. v. Wrightwood Dairy Company*,[58] the "reach of the power of Congress" over interstate commerce was held to extend to—

> "those intrastate activities which in a *substantial way* interfere with or obstruct the exercise of the granted power." (Emphasis supplied.)

The application of the foregoing rule to the National Labor Relations Act finds particular expression in the article on "Business Subject to the National Labor Relations Act"[59] where the author after referring to the *Jones & Laughlin case* makes the following observations:

> "In other words, the application of the act is to be confined to those enterprises in which a dispute concerning labor relations may be said to interfere with the movement of commerce among the states. The test in each case, therefore, is whether a strike or other disturbance on the part of the employees engaged in the particular business involved would operate as a burden upon commerce. * * *
>
> "Normally a stoppage of operations due to labor difficulties in a particular enterprise engaged in production or distribution will not interfere with the movement of goods among the states. It will interfere only if the company affected does a substantial interstate business."

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[57] 306 U. S. 601, 83 L. ed. 1015.

[58] 315 U. S. 110, 86 L. ed. 726.

[59] 35 Mich. L. Rev. 1289, 1294.

(f) Failure to Recognize the Traditional and Time-Honored Distinction, Removing From Federal Control Local Businesses

In *Federal Trade Commission v. Bunte Brothers, Inc.*,[60] the Federal Trade Commission had argued that it could proscribe unfair methods used in intrastate sales when they resulted in a handicap on interstate competitors. But the Court answered—

> "The construction of Section 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. * * *"

Thus, we again have an admonition from this Court to Federal agencies to not exercise their jurisdiction over a "host of local enterprises," or, as here, "myriads of local businesses" unless specifically granted—and the meaning of the Court cannot be mistaken, inasmuch as the cited case dealt with a manufacturer of candy and, therefore, the "local enterprises" or "local businesses" were necessarily the retail media or outlets, to which such manufacturer sold.

(g) Failure to Follow Characterizations by This Court of the Intrastate Quality of "Goods Acquired and Held by a Local Merchant for Local Disposition" in Recent "Wholesale" Cases

We invite particular attention to the recent pronouncement by this Court in *McLeod v. Threlkeld*,[61] con-

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[60]312 U. S. 349, 355, 85 L. ed. 881, 885.

[61]319 U. S. 491, 494, 87 L. ed. 1538, 1541.

cerning a related subject, where the opinion rendered by Mr. Justice Reed states:

> "So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, *while those employees who handle goods after acquisition by a merchant for general local disposition are not.*" (Emphasis supplied.)

In *Walling v. Jacksonville Paper Company*,[62] this Court in considering the business of a wholesaler under the Fair Labor Standards Act adverted to the "stream of commerce" concept, and said per Mr. Justice Douglas:

> "We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from *goods acquired and held by a local merchant for local disposition,*" (Emphasis supplied.

thus, clearly indicating the "local merchant" as outside of the "stream of commerce" concept extending federal control to intrastate business.

See, also, *Higgins v. Carr Brothers Company.*[63]

In *American Steel & Wire Company v. Speed*[64] goods placed in the warehouse in a city for local distribution were likewise held to have reached their destination and to be no longer in transit and, consequently, to have become the subject of local commerce. To like effect, see *Dalton Adding Machine Company v. Commonwealth.*[65]

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[62]317 U. S. 564, 570, 87 L. ed. 460, 467.

[63]317 U. S. 572, 574, 87 L. ed. 468, 471.

[64]192 U. S. 500, 48 L. ed. 538.

[65]246 U. S. 498, 62 L. ed. 851.

(h) Failure to Follow Decisions Under Federal Acts With a Like Jurisdictional Standard, Labeling Local Activities as Having Only an Indirect or Local Effect on Interstate Commerce

We here refer to the case of *A. L. A. Schechter Poultry Corporation v. United States*, supra.

(i) Failure to Apply the "De Minimis" Doctrine to a Minor or Negligible Quantum of Interstate or Quasi-Interstate Sales

We confidently assert that the "de minimis" doctrine applies.[66] A bare 1% of total sales certainly is encompassed by the "de minimis" doctrine.

This is not to say that the commerce power does not extend to an interstate transaction, be it great or small; it is, however, an assertion that, where the search is whether or not a labor dispute will burden or obstruct interstate commerce, an enterprise with only a one per cent interstate business cannot by any stretch of the imagination be considered to threaten either a burden or an obstruction to interstate commerce.

(j) Over-Ascribing Importance to Advertising, Soliciting Only Over-the-Counter Intrastate Sales

The lower Court has likewise placed great stress upon the small circulation in Iowa of the Omaha Daily Newspaper, as well as the negligible advertising carried in the Council Bluffs, Iowa, Newspaper. There is no

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[66]National Labor Relations Board v. Fainblatt, 306 U. S. 601, 307 U. S. 609, 83 L. ed. 1014.

showing in this record that any interstate sales were solicited thereby. On the contrary, only intrastate or over-the-counter sales were sought. The record is uncontradicted that the Store, because of many considerations, did not seek Iowa business, but only such business as gravitated to the Store by reason of Iowa workers or visitors coming into Omaha.

Such advertising, however, cannot aid the Board's jurisdiction. As stated in an article on "Interstate Commerce and the National Labor Relations Board,"[67]

> "In some cases the conduct of the employer's business is an unspoken admission that he is engaged in competition for an interstate market."

This statement is supported by citations of Board Decisions which show *national* advertising, *national* distribution of salesmen, or use of *nationally* recognized labels. There is nothing of that character in this case; on the contrary, we find here the direct antithesis thereof. The Store had no aspirations for an interstate market.

Furthermore, mere advertising does not give an interstate commerce character. In *Blumenstock Bros. Advertising Agency v. Curtis Publishing Company*[68] it was held that the mere incidental relation to interstate commerce of transactions concerning advertising in periodicals to be circulated through the United States would not support an Anti-Trust Act proceeding.

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[67]52 Harv. Law Rev. 490, 492.

[68]252 U. S. 436, 64 L. ed. 649.

(k) Failure to Observe Judicial Holdings of Absence of Burden on Interstate Commerce to Appreciable Extent by a Local Labor Dispute, Even Though Local Business Seriously Disrupted

We advert to actual adjudications where this Court has encountered threatened or impending labor disputes and has been called upon to pass on the possible effects thereof on interstate commerce.

Industrial Association of San Francisco v. United States[69] involved an inquiry into local practices designed to break up a closed shop front in the building trade industry. This Court proceeded to hold:

> "The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter; namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. * * *
>
> "No doubt there was such an interference, but the extent of it, being neither shown nor perhaps capable of being shown, is a matter of surmise. * * *
>
> "The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing, or growing crops,—and *if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.* * * *
>
> "The four cases and the one here, considered together, clearly illustrate the vital difference, under the Sherman Act, between a direct, substantial, and

[69] 268 U. S. 64, 69 L. ed. 849.

intentional interference with interstate commerce, and an interference which is incidental, indirect, remote and outside the purposes of those causing it." (Emphasis supplied.)

Other decisions to like effect are cited in the footnote.[70]

IV. The Questions Presented Herein Are of Great Public Importance.

We adopt herein, and will not further expand, the reasons adduced on this topic in the foregoing Petition at page 17 thereof.

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CONCLUSION

We respectfully submit that the foregoing brief demonstrates more than adequate, probable cause for the grant of Certiorari in this case. Certainly, the decision of the lower Court is not only in conflict with like and apposite decisions or holdings of the Circuit Courts of Appeals in other Circuits, but is demonstrably in probable conflict with applicable decisions of this Honorable Court. An important question of Federal Law, for the first time, is presented to this Court, of great influence upon the Labor Relations of a vast—the distribution or retailing—segment of the Nation's business. This Honorable Court's discretion should, therefore, be exercised

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[70] **United Mine Workers v. Coronado Coal Company**, 259 U. S. 344, 410, 66 L. ed. 975; **United Leather Workers v. Herkert & Meisel Trunk Company**, 265 U. S. 457, 68 L. ed. 1104. It is noteworthy that this Court in **National Labor Relations Board v. Fainblatt**, supra, relied heavily upon Sherman Anti-Trust Act cases, involving labor disputes, to demonstrate that interrupton of intrastate activities could result in restraint of interstate commerce "where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce."

in favor of the grant of Certiorari, that this important question of the coverage of the National Labor Relations Act, with respect to retail selling activities, may be settled by final decision of this Court.

Dated at Omaha, Nebraska, August 12, 1944.

Respectfully submitted,

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